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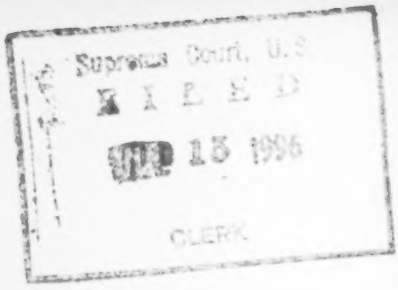

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DR. BEN BRANCH, TRUSTEE OF BANK OF NEW ENGLAND CORPORATION, on behalf of and in the name of MAINE NATIONAL BANK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF

MICHAEL S. GIANNOTTO
CELESTINE R. MCCONVILLE
SHEA & GARDNER

JEFFREY C. MARTIN
Counsel of Record
SHEA & GARDNER
1800 Massachusetts Avenue, NW
Washington, DC 20036
(202) 828-2000

Counsel for Petitioner Dr. Ben Branch

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13 pp

TABLE OF CONTENTS

Page

1. *The Decision Below Expands A Square Conflict Among the Lower Courts* 2
2. *The Per Se "Physical" Appropriation Cases Apply* 4
3. *This Case Involves Appropriation By and For the Government* 5
4. *The Government Erroneously Employs A Facial, Substantive Due Process Analysis* 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES **Page**

Colorado Springs Production Credit Ass'n v. *Farm Credit Administration*, 967 F.2d 648 (D.C. Cir. 1992) 2, 9

Commercial Builders of Northern California v. *City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) 3

Concrete Pipe & Products of California, Inc. v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) 5, 6

Connolly v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) 5, 6

Dolan v. *City of Tigard*, 114 S. Ct. 2309 (1994) 3, 9

Ehrlich v. *City of Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (1996), *reh'g denied*, 1996 Cal. LEXIS 2098 (Cal. Apr. 11, 1996) 3

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 4, 7

Munn v. *Illinois*, 94 U.S. 113 (1876) 7

Nollan v. *California Coastal Commission*, 483 U.S. 825 (1987) 3

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 3

Page

United States v. *Pewee Coal Co.*,
341 U.S. 114 (1951) 3

United States v. *Sperry Corp.*,
493 U.S. 52 (1989) 5, 8

United States v. *Winstar Corp.*,
64 U.S.L.W. 4739 (U.S. July 1, 1996) 2, 6

Waters Landing Ltd. Partnership v. *Montgomery County*,
337 Md. 15, 650 A.2d 712 (1994) 3

Webb's Fabulous Pharmacies, Inc. v. *Beckwith*,
449 U.S. 155 (1980) 2-3, 5

STATUTES

Financial Institutions Reform, Recovery, and
Enforcement Act of 1989 ..... *passim*

12 U.S.C. § 1815(e)(1)(B) 5

12 U.S.C. § 1821(a)(4)(A) 6

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REPLY BRIEF

As we showed in the Petition, the Government's forced failure and appropriation of the Maine National Bank ("MNB") in 1991 upset over 100 years of deeply-rooted expectations in the banking industry and was engineered for the gain of the Government itself. The Government maintains that this seizure -- effected pursuant to FIRREA's cross-guarantee provision -- worked no compensable taking. The Petition demonstrated that the decision below adopting the Government's position should be reviewed by this Court because it: (1) conflicts with this Court's taking decisions; (2) expands a widespread conflict

among the appellate courts over the standards for judging the takings status of a targeted monetary assessment; and (3) presents an issue of national importance.

The Government's Brief in Opposition does not dispute that this case presents an issue of national importance. Instead, the Government first seeks to dismiss the conflicts among the lower courts and then argues that the decision below is consistent with this Court's decisions. We address the Government's arguments below. We also address the significance of this Court's recent decision in *United States* v. *Winstar Corp.*, 64 U.S.L.W. 4739 (U.S. July 1, 1996), in which this Court rejected the Government's comparable attempt to use FIRREA to ride roughshod over established investment-backed expectations in order to save money for the deposit insurance fund.

1. The Decision Below Expands A Square Conflict Among the Lower Courts. The Government maintains that the conflict among the lower courts regarding the test to use in judging whether a targeted monetary assessment is a taking is irrelevant here. It asserts that the decisions shown in the Petition to be in conflict with the ruling below involve land or largely unregulated businesses where property expectations are more firmly grounded than in banking. Br. Opp. 7. This characterization of the cases is incorrect.

The D.C. Circuit decision in *Colorado Springs Production Credit Association* v. *Farm Credit Administration*, 967 F.2d 648 (D.C. Cir. 1992) involved a monetary assessment imposed on agricultural banks. The court there reasoned that forced assessments on banks paid to a government corporation are takings unless they are roughly commensurate with benefits received by the banks under the statute providing for the assessments. *Id.* at 654-55. This ruling is based on, and in keeping with, this Court's decision in *Webb's Fabulous*

Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980), a case that also involved a monetary assessment, not an interest in land.[1]

Similarly, the Ninth Circuit's decision in *Commercial Builders of Northern California* v. *City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), and the California Supreme Court's decision in *Ehrlich* v. *City of Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (1996) involved land developers -- which are highly regulated -- on which the government had imposed monetary assessments as a condition of regulatory approvals. These cases found takings where the assessments were not related to and commensurate with the social costs caused by the proposed development project, based on individual factfinding. Contrary to the Government's suggestion here, these cases did *not* involve transfers of interests in land -- they involved monetary transfers.[2]

The second question presented in the Petition is whether a targeted monetary assessment that is not a fair approximation of, or roughly proportionate to, benefits received or social costs imposed by the assessed party constitutes a taking under the

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[1] Moreover, contrary to the Government's proposed distinction, the takings decisions of this Court on which the Petition relies generally do involve regulated businesses. For example, *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951) involved coal mines; the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) involved railroads. Both are highly regulated industries. *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994) and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) concern the extent to which government can condition regulatory approvals on required transfers of property interests to the government. By definition, that involves regulated businesses.

[2] Certain cases cited in the petition such as *Waters Landing Ltd. Partnership* v. *Montgomery County*, 337 Md. 15, 650 A.2d 712, 724 (1994) do limit the *Nollan/Dolan* tests to required transfers of interests in land. See Pet. 26. But that is yet another aspect of the conflict among the lower courts that this Court should resolve by granting certiorari in this case.

Fifth Amendment. Pet. i. The Ninth Circuit, D.C. Circuit and Supreme Court of California have answered this question affirmatively, while the Federal and Second Circuits have answered it negatively. Only by ignoring this question in favor of a blinkered focus on FIRREA's cross-guarantee provision can the Government contend there is no conflict among the lower courts.

2. The Per Se "Physical" Appropriation Cases Apply. The Government argues that the heightened takings scrutiny applicable to physical appropriations of property (as opposed to regulation of property) should not apply to the seizure of MNB's assets because the seizure was the consequence of a monetary assessment. In the Government's view, it is of no constitutional significance that the monetary assessment, instead of claiming a percentage of MNB's net worth, resulted in its total appropriation. Br. Opp. 8-9.

The Government's position that it is irrelevant that all of MNB was taken is strikingly reminiscent of Justice Steven's dissent in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting). The Court in *Lucas*, however, rejected that position and made clear that when a regulation deprives a property owner of all beneficial use the regulation is "the equivalent of a physical appropriation" and hence constitutes a taking without case-specific inquiry into the public interest advanced in support of the regulation. *Id.* at 1015-19 & n.8.

In the present case, the FDIC's actions were not merely the "equivalent" of a physical appropriation of MNB -- they *were* a physical appropriation. The Government engaged in a deliberate, concerted effort to "fail" MNB and take all of its property, real, personal and intangible. See Pet. 13. Thus, not only is the Government's position contradicted by *Lucas*, its

acceptance would -- as the Petition explained -- provide a huge loophole for avoiding categorical treatment of physical appropriations of property. See Pet. 14.

Furthermore, even if only a monetary assessment were at issue here, that would not mean that categorical treatment is inappropriate. *Webb's* and *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989) hold that the government may not appropriate a privately owned fund of money unless the targeted appropriation is a small percentage of the fund and a fair approximation of the benefits supplied by the government in return. The Government's brief (at 8) mistakes the import of those cases by drastically overreading a statement by this Court in *Sperry*. Specifically, this Court stated in *Sperry* that it would be artificial to view a "deduction[] of a *percentage* of a monetary award" as a physical appropriation of property, since reasonable filing fees can be charged. 493 U.S. at 62 n.9 (emphasis added). It did not, as the Government implies, state that appropriation of an entire fund (or a corporation's total net worth) would not constitute a *per se* taking.

3. This Case Involves Appropriation By and For the Government. The Government denies that this case involves a targeted assessment and seizure for the Government's benefit. Br. Opp. 9-11. It contends instead that the Government was merely adjusting rights and liabilities of private parties as in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) and *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993). Yet it is undisputed that the FDIC made a discretionary determination as to whether and how much to assess MNB. See Pet. 6 n.8; Br. Opp. 4 n.2. It is equally clear that the FIRREA cross-guarantee assessments were payable to the FDIC, 12 U.S.C. § 1815(e)(1)(B), Pet. App. 63a, not to other private parties. And it is undeniable that MNB was seized and sold by

the FDIC to reduce the FDIC's losses as insurer and to benefit the Bank Insurance Fund, which is a government fund owned and maintained by the FDIC to carry out its insurance responsibilities. Pet. 6-7; 12 U.S.C. § 1821(a)(4)(A).

Hence, unlike the laws at issue in *Connolly* and *Concrete Pipe*, which altered the employer's ERISA withdrawal liability to a *private* pension trust,[3] this case involves direct appropriation of property by the Government.

In this regard, there is a striking parallel between this case and this Court's recent decision in *United States* v. *Winstar Corp.*, 64 U.S.L.W. 4739 (U.S. July 1, 1996), which involved the same statute (FIRREA) as involved here. In *Winstar*, the thrift deposit insurance regulators had encouraged investment in ailing thrifts by permitting acquiring entities to count supervisory goodwill as capital, and that permission was embodied in contracts. Congress in FIRREA subsequently changed the law, preventing the regulators from honoring their agreements, as part of its efforts to remedy shortfalls in the insurance fund applicable to thrifts. Relying in part on the Takings Clause principle that the Government may not force a few people to bear burdens which should be borne by the public as a whole, *id.* at 4755, this Court held the Government liable for breach of contract. The Court rejected the Government's "sovereign acts" and "impossibility" defenses in part on the ground that FIRREA was an intentional act of governmental self-relief to save money for the insurance fund. *Id.* at 4754-57. Likewise, here, the assessment and seizure of MNB pursuant to FIRREA was an exercise of intentional governmental self-interest to save money for the insurance fund. The only

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[3] See *Connolly*, 475 U.S. at 222, 224 (liabilities are "not to the Government, but to a pension trust"; "the United States has taken nothing for its own use"); *Concrete Pipe*, 508 U.S. at 644 (same).

difference from *Winstar* is that instead of destroying expectations grounded in contract, the Government here shredded MNB's reasonable investment-backed expectations grounded in over a century of established corporate law.

4. The Government Erroneously Employs A Facial, Substantive Due Process Analysis. The Government maintains that the three-factor regulatory takings test governs this case. In applying this test, it first admits, with considerable understatement, that the economic impact of the FDIC's action on MNB was "undoubtedly substantial." Br. Opp. 9. But the other two factors are deemed, in the Government's view, to trump the impact factor. Thus, the nature of the government action at issue -- enactment of FIRREA's cross-guarantee provision -- was "to address emerging or recently perceived harms," and MNB, as a member of a highly regulated industry, had no reasonable investment-backed expectations that such action would not be taken. Br. Opp. 10-13.[4]

In addition to the fundamental problem of viewing this as a regulatory takings case, the Government goes astray by engaging in a facial analysis of FIRREA's cross-guarantee provision more appropriate to a substantive due process claim

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[4] The Government cites *Munn* v. *Illinois*, 94 U.S. 113, 134 (1876) for the idea that "[a] person has no property, no vested interest, in any rule of the common law." Br. Opp. 11 n.5. That means no more than that the legislature can change the rules regulating property. As the *Munn* Court put it, "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations." 94 U.S. at 134. Certainly property rights created by common law cannot be taken by the government without compensating the owner. *Lucas*, 505 U.S. at 1027 (regulation depriving property owner of use requires compensation unless "the proscribed use interests were not part of his title to begin with").

than the "as-applied" takings challenge that this case involves. Thus, the Government maintains that FIRREA's cross-guarantee provision was intended to address the problem of multi-bank holding companies manipulating the assets and liabilities of affiliated banks so as to concentrate bad assets in one bank and increase the FDIC's losses. Br. Opp. 11-12 & n.6. Yet the Government does not dispute that there existed no such manipulation here, and that Maine National Bank had in no way contributed to the losses sustained by the FDIC as a result of Bank of New England's failure. See Pet. 17-18; Pet. App. 29a-33a.

The inquiry under a regulatory takings analysis is not whether FIRREA's cross guarantee provision has a rational basis, but whether the FDIC's actions effected a taking of MNB's property, given MNB's expectations and conduct. As discussed in the Petition, prior to FIRREA, the government had never claimed the ability to appropriate all assets of a bank solely to benefit the government itself, where the bank engaged in no wrongdoing. Pet. 20.

The Government also asserts, as an alternative justification for the seizure, that "[t]he cross-guarantee requirement is a reasonable and constitutional price for banks to pay for the right to conduct their business within the holding company form." Br. Opp. 13. It contends that statutes authorizing operation of multi-bank holding company systems conferred benefits on the members of that system. But this argument also misses the mark here. First, the regulatory benefits in question were not conferred by FIRREA. They pre-existed that statute. Second, the benefits were wholly speculative as to MNB and were certainly not a "reasonable" price to pay for its complete destruction. MNB, without warning or opportunity to escape from the cross-guarantee assessment, and with no responsibility for the FDIC's losses, was totally appropriated. Thus, the

Government's effort to categorize the seizure of MNB as a reasonable user fee of the sort sustained in *Sperry*, or as a reasonable compelled bargain of the kind upheld in *Colorado Springs*, 967 F.2d at 657, simply runs aground on the facts.

In sum, the Government's brief signs onto the Federal Circuit's notion that MNB's takings claim must fail so long as the cross-guarantee provision on its face serves a rational governmental purpose. This Court should grant the writ to make clear that the Takings Clause has a role to play independent of substantive due process and is not a "poor relation" of other Bill of Rights guarantees. See *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2320 (1994); Pet. 10, 18-20, 25.

CONCLUSION

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

MICHAEL S. GIANNOTTO
CELESTINE R. MCCONVILLE
SHEA & GARDNER

JEFFREY C. MARTIN
Counsel of Record
SHEA & GARDNER
1800 Massachusetts Avenue, NW
Washington, DC 20036
(202) 828-2000

Counsel for Petitioner Dr. Ben Branch

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